United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

76-1140

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1140

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

V.

DAVID N. BUBAR, ET AL.

DEFENDANT-APPELLANT

Supp

SEPARATE APPENDIX

FOR

DEFENDANT-APPELLANT ALBERT COFFEY

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PAGINATION AS IN ORIGINAL COPY

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CLOSING ARGUMENT OF UNITED STATES ATTORNEY AND RELATED COLLOQUY:

want to be certain about because the Court gave two reasons and I wasn't sure. You said, one, you didn't think it applied to the conspiracy Count and it might apply -- there might be enough evidence for the other Counts anyway.

On the latter part there is no point in re-submitting --

THE COURT: There is no point in resubmitting anything now because the time for request has long since been passed and I have received them and I have ruled on them.

MR. ZALOWITZ: One final question, sir, as to the items that were discussed at bench. Do I have the balance of the day to converse with the honored counsel that was at the side bar for the conclusion?

THE COURT: That problem won't come up until Mr. Sagarin makes his argument. Perhaps I should clarify the record. This concerns Mr. Sagarin's request yesterday as to the extent to which he could argue to the jury the limitations he is under in seeking to develop his defense that the checks are for non-criminal purposes and one of those limitations is that to some extent the evidence is hearsay and he can't cross-examine a checkbook and I indicated yesterday that obviously there is a concern about any argument that would seek to have the jury draw an adverse inference from the defendants not taking the stand and I may have overstated the point a little in suggesting that he was under the same limitation as a

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prosecutor.

I don't think it's the same situation. Anything a prosecutor says in this area could only be said to draw an adverse inference and that's why a prosecutor cannot even put his toe in this particular pond. What Mr. Sagarin suggests I think is quite different. Obviously he is not trying to suggest that those who don't take the stand are guilty, since he represents a defendant who didn't take the stand, so I don't think there's any concern that he is going to urge the jury to think that someone who doesn't take the stand did something wrong.

So long as he doesn't in any way urge that the jury directly or indirectly think ill of Reverend Bubar, which I don't think he has any intention of doing for not taking the stand, he can make the argument which really is his argument and Reverend Bubar's argument as well, that the checks didn't go for any criminal purposes and to the extent circumstances were not developed that we don't know what a particular entry meant or something like that, there can be argument along those lines but obviously it can't adversely reflect on a defendant for not taking the stand.

So I think that standard can be kept in mind with fairness to both defendants.

MR. ZALOWITZ: Your Honor, I did say my last question and I might amend the last question for this to be the

With respect to the truck, not only did Connors drive it up here but he specifically noted, I think you will find it in his statement, that he wore gloves while he was in the truck. Now, if a man wears gloves at all times that's one thing but gloves can also can be the first indication of his avoidance of any responsibility here by avoiding the finger-print problem. You remember that he was also cautioned on his driving. You remember his statement about he had, if I recall correctly, been originally instructed sometime in February to plan to make this trip and he was given various instructions.

He tried to go to a bar initially to await further instructions. He was there on a Friday in the latter part of February. He got several calls telling him that the thing was going to be cancelled and that's totally consistent with what John Shaw told you, and the telephone calls from Anthony Just in the following week on a Thursday the trip was on. He was eventually brought to Boyers by car, and you have the description from John Shaw that he was in fact there brought in a Cadillac by Peter Betres.

He eventually, by virtue of the circumstances, was inclined to know that something was wrong although he says throughout he had no knowledge of what was involved and that's been his primary defense. He started a trip not knowing where he was going, all he knew he was going to take a certain route and when he got to Route 84 in New York, he was to make a phone

call. That's not a legitimate type of truck trip. I think it's almost obvious, to call an unknown person. He called someone on the telephone and was given further instructions. He eventually ended up at the Howard Johnson's Restaurant and there he met the man who had given him instructions that morning, and didn't go to the plant, didn't make a delivery, went down the road to a motel, was told he would get further instructions later.

He said specifically he drove to the plant only after he had been instructed, and he had waited a period of time, not knowing where he was going or what he was going to be doing. He told you about -- or he said in the various statements -- he didn't testify to this -- what I am saying to you, these are the statements that were read to you, he was told that he was to take the material to a plant. He did so. The load was refused and then he went back to the Howard Johnson's.

Several of the quotations are he didn't know what was going on but he didn't ask anything about it. He finally had the truck unloaded and although the circumstances of the trip started without knowing the destination and information instructions being given en route was strange, but he didn't ask for explanations because he was primarily interested in getting paid and he didn't want to know the details because the less he knew the better off he knew he would be.

there is a question about it, you can examine it. The fingerprints themselves in the form of photographs that were taken of them is for you to analyze.

You will remember that they are basically fingerprints of three defendants: Michael Tiche, a fingerprint found on that box and the back which was removed. That box was removed from the back of the car of Sponge Rubber Products Company that were being driven by David Bubar.

You have the actual fingerprint cards which you can, if you wish to do so, make comparisons with any of the other photographs that we have on that subject.

You have the fingerprint expert come and tell you about Mr. Tiche. This being the latent fingerprint that he took off the box. This being the inked fingerprint that he had a sample of. He explained to you the points of similarity. The same thing is true of the exhibit where it pertains to Anthony Just, and this is just one of them.

You will remember there were several fingerprints on the lamp in the motel room in Danbury and then lastly there is the same scene, the fingerprints compared or one fingerprint compared from the latent print found in Danbury of Ronald Betres with the indexed -- the inked print of which you have the record there.

It's interesting to note, ladies and gentlemen, whereas some cross-examination took place of each of the

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handwriting experts and the fingerprint expert who came in and made the identification, there was no contrary testimony. I suggest to you and the judge will instruct you but you are not obliged to accept the testimony of an expert. It is for you to make the final judgment, of course, but I suggest that the explanation was clear and cogent and is worthy of your finding it to be credible.

Now, in addition to the positive aspects of the cases the Government has presented in corroboration of John Shaw, I point out to you that in several items of the evidence that I have already referred to there is clear evidence of an opportunity to cover up what truly took place. The registration of the McAlpin Hotel in the name of Jamieson, reserved in that name by Mr. Bubar, registered in that name by Mr. Betres. Ask yourselves the question, if that is a legitimate interrelationship between any one or more of these people, why the false names, why the false registration on the Avis Rent-A-Car; and I point out to you that it's rather significant that not only is that Avis Rental truck corroborated by the identification of Mr. Coffey's signature, but keep in mind Mr. Coffey lived at the Alhambra Hotel and Raymind Gray in January lived at the Alhambra Hotel. Raymond Gray testified he renewed his license from the Alhambra Hotel, sent in the money and never got the license. A few months later he asked for a duplicate license.

Now, that obviously gave Mr. Coffey the

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hold them as customers. No effort made whatsoever. Indeed they were discouraged. The indications were there was no particular interest in holding them as customers.

In other words, it's not the easy answer to say there was simply no business that Moeller could in any way make money at. All he had to do was raise the prices and there is no effort made to raise the price and at the same time hold the customer. They just simply chased those large customers, something in the range of, if I recall correctly, of a reduction of mattress production in excess of 50 percent, just chased them right out the door.

Now, if there was a bona fide intention to run the mattress business, where was there any effort to counter them with what the Government offered in the way of evidence that the customers had been discouraged by which Mr. Moeller might have demonstrated to you that he was trying indeed to hold the customers?

The elimination of those customers I suggest to you is consistent with intent on Mr. Moeller's part to terminate the mattress business and then terminate it. It was because the plant was demolished on March 1st and March 2nd.

Keep in mind that not only was there no effort to retain the customers but there was a total elimination of research and development as far as we can tell. If I recall correctly, there were a number of people testified to being in

replacement insurance is honored, as Mr.Moeller fully contemplated in having arranged its purchase prior to the fire, then since with the replacement of the equipment and the building, should it take place, Mr. Moeller will have new equipment in the plant owned by his company, they will have a new building, and for all intents and purposes, they will have a new building at considerably higher value since its reproduction, its replacement is going to cost more than it was valued at when he arranged to buy it from B. F. Goodrich.

Even if he does not replace it, the actual value under the conceded insurance -- when I say conceded, there is an argument with the insurance company as to whether the replacement value coverage has been effectuated, but even if only the actual value is substituted in the form of a cash payment that will clearly restore the value that Mr. Moeller claims he has lost in the reduction of his stock by the destruction of buildings because those buildings, you will remember, figures from the insurance man as to what the various buildings were insured for as their approximate actual value prior to the Sponge Rubber insurance.

THE COURT: I will excuse the jury for a recess.

(A recess was taken at 3:40 p.m.)

(In the absence of the jury: 4:00 p.m.)

MR. GOLUB: I have a number of motions to make at this time. As you recall, I believe during Mr. Dorsey's

statement, Mr. Dorsey's closing argument -- I have a number of motions to make at this time. As the Court will recall during Mr. Dorsey's closing argument in explicit reference to the Defendant Connors, Mr. Dorsey instructed the jury that Connors had not testified in the case. He made that comment during the course of discussing Connors other statements which were introduced by statements where the --

THE COURT: Before you go further, what I would like to do is to make the best use of the available time. If your motion is a motion for a mistrial, obviously if I hear you at 5 o'clock the motion will be as good as at 4 o'clock. If you have any request of me to say anything at all to the jury at this point, that I want to hear right now, but if you don't want me to do that and your motion is for a mistrial, I would rather be sure Mr. Dorsey has argument time between now and 5 o'clock and we can then send the jury home and I can hear your motion.

MR. GOLUB: May I have 15 seconds to confer with Mr. Clifford before I respond to the Court.

I want to make clear that the motion is not precisely a motion for a mistrial but I believe the Court understands the implications of what I am going to be moving--

THE COURT: Let me broaden the inquiry. Is your motion for me to do anything that needs to be done at this point rather than at 5 o'clock?

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MR. GOLUB: No.

THE COURT: I will hear you at 5 o'clock.

MR. BOWMAN: I have a request, your Honor. Mr. Dorsey made mention in his argument that certain expert testimony was uncontradicted and I believe that's a comment on the defendants' burden to present their own expert testimony to contradict the testimony of the experts.

I feel that the Court should instruct the jury that this is argument and there is no burden, the law places no burden on the defendants to produce any testimony in their own behalf on any particular point.

THE COURT: He made an observation that some evidence is uncontradicted.

MR.BOWMAN: It was specifically in reference to the expert testimony, specifically in reference to it.

MR. CRAIG: He said there is no testimony to the contrary.

MR. CURTIS: He said both. He said some things uncontradicted. He did make a comment that expert testimony was uncontroverted.

THE COURT: I don't know that there's anything wrong with saying testimony is uncontroverted providing that is accurate and I take it it is accurate.

MR. BOWMAN: My impression was that comment that the expert testimony was uncontradicted is a comment on

the fact that certain defendants did not present their own experts to disprove what the Government experts testified to and their conclusions.

THE COURT: I will certainly as in any charge tell the jury that the burden is on the Government, that the defendant doesn't have to present any evidence but if evidence is controverted, I don't see why the Government can't emphasize the strength of their evidence by pointing out to the jury that it is uncontroverted. I don't know any rule that says that they can present -- there might be a problem if the only possible way it could be controverted came from the defendant but that's certainly not the case here.

Bring in the jury.

(The jury entered the courtroom, 4:05 p.m.)

MR. DORSEY: At the point of which we interrupted, ladies and gentlemen, I was discussing with you what I consider to be the basis of the finding of the motive. Motive alone is insofar as the defendant Moeller is not the basis on which a conviction can be found.

The real question is what did Mr. Moeller do about carrying out what I contend may have been his motivation. Basic things that he did was to give Mr. Bubar $35,000.

Now, initially it was his claim this was in response to a fund solicitation by Molly Festa, that the Defendant Bubar had unpaid bills and needed money to cover them.

sequence because it is, of course, all to be taken into context.

I apologize for having taken so much of your time in this way, particularly when it's so awfully hot in this room, but I appreciate your attendance and the courtesy of your attention and I will, of course, address you once further before the case is concluded.

Thank you, your Honor.

THE COURT: Ladies and gentlemen, we will resume tomorrow morning at 10:00 o'clock promptly. Please continue to observe the admonitions I have given you about not discussing the case nor reading about it. If there should be any particular accounts, just observe all the cautions I have given you continuously throughout the trial.

All right, the jury is excused until 10 o'clock tomorrow morning.

(The jury was excused at 5 o'clock p.m.)

(In the absence of the jury.)

MR. BOWMAN: I want to reiterate my points I brought up -- I checked my notes with the notes of other counsel and Mr. Dorsey's statement in conjunction with the expert testimony was that there is no testimony to the contrary. It was a comment on the defendants' burden to bring forth testimony to the contrary and I believe it is impermissible and I think that the jury should be instructed with reference to that comment that the defendants are under no burden whatsoever to

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produce such testimony.

THE COURT: When you say you want them instructed, do you want something said in a basic charge or are you asking that something be said when they return tomorrow morning?

MR. BOWMAN: Well, there is a problem. I think the Court has mentioned it already once in response to Mr. Koskoff's claim. I am not sure, you know, whether the jury took that to cover everything that Mr. Dorsey -- I am not sure that tomorrow morning would add that much to it in the respect that I felt that it should have been addressed more immediately; however, I would appreciate an instruction by the Court to the jury that the defendants are under no burden to produce any testimony in that any reference by the prosecutor to the burden of the defendants to produce testimony in argument cannot be considered by --

THE COURT: I am not clear. Do you want something said in the charge as a whole or are you suggesting something should be said tomorrow?

MR. BOWMAN: I would like a moment to reflect on it.

MR. GOLUB: Your Honor, as I initially mentioned at the conclusion of the last recess during Mr. Dorsey's closing argument, he mentioned that Mr. Connors had not testified. He made that statement as to Mr. Connors at a crucial time, in any

event, or crucial point in his remarks.

He had just summarized the evidence that the Government has put in concerning Mr. Connors' suspicion and he made comments to the effect he should have been suspicious, he closed his eyes and then he said he did not testify. And I think that the obvious thrust of that was, and this goes not only to the conscious avoidance issue but to the general culpability of the man himself, as Mr. Dorsey is presenting it to the jury, the thrust of it was if he weren't guilty he would have explained these statements that we have introduced against him.

I think that the Court in denying Defendant Connors' motion for a directed -- for judgment of acquittal -- stated on the record this was a close case. The Court in discussion of the closing arguments and to the request to charge in the last proceedings before Mr. Dorsey began his closing argument could not have made it clearer that the prosecutor was not to put his toe in the pond, that the prosecutor was not to mention, was not to breach the subject of a defendant not testifying and it wasn't a general reference, your Honor. It was a specific reference to Defendant Connors not testifying.

In light of the Court's admonition to the prosecutor before the beginning of his argument and in light of the closeness of the case, in light of the obvious impact of the statement, I move at this time for a judgment of acquittal.

THE COURT: I have the impression that is not

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the extent of your request or is it? I would like to hear all of your argument and not deal with it piecemeal, but you give the impression you are about to go on to something.

MR. GOLUB: Is that because my lips were pursed? I have more to say.

THE COURT: I just as soon hear all of your contentions.

MR. GOLUB: The other motion which I can make, and which is an obvious motion under the circumstances, a motion for mistrial -- I am uncertain right at this second as to the effect of the law and with respect to the double jeopardy on a motion for a mistrial.

There are peculiar circumstances in this case which lead me to suspect that if a motion for a mistrial were granted, it might be double jeopardy and it might be that jeopardy might attach and it might be that Defendant Connors would not be triable again in Federal Court.

I am aware that there is law to the contrary I believe and before I move for a mistrial and allow the case to be terminated at a point where there has been 16 weeks of testimony or however many weeks of testimony and at a point where up until Mr. Dorsey's comment, I, as his counsel, felt that, as the Court stated, it was a very close case, and at a point at which I am not sure I believe I am able to duplicate the closeness of it in another trial, I am reluctant for all those reasons to move for a mistrial at this time.

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I know that's the general procedure and what I would like to do is I would like to reserve my right to move for a mistrial. I would like to reserve it at least until tomorrow morning to give me a chance to look at the law on that. I don't think that there is any harm in reserving the right to move for a mistrial since it doesn't really seem to have any immediate impact other than what I argue tomorrow, I suppose, and so if I alert the Court tomorrow and allow the Court to rule before I move for a mistrial, I will allow the Court to rule before I argue, and there is no detriment to the case.

So I think that because of the Court's deliberate specific admonition to the prosecutor, what we have is what amounts to prosecutorial misconduct and that's why I move for a judgment of acquittal in light of the other circumstances, the closeness of the case and the other factors I have mentioned.

If the Court deems that a judgment of acquittal is not warranted at this point, I would like to consider whether or not I want to move for a mistrial if jeopardy does not attach. That's not to say I don't think that the prosecutor's comments had a grievous impact on the jury, but there are many considerations.

THE COURT: I take it that the main thing you are saying at the moment is you would like to be heard tomorrow morning on something else?

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MR. GOLUB: On the mistrial motion. I would like the Court to rule tonight on the motion for judgment of acquittal.

THE COURT: I want to know all your claims before I rule.

MR. GOLUB: I have another claim, your Honor.

THE COURT: Is that for tonight or tomorrow?

MR. GOLUB: Tomorrow.

MR. BOWMAN: Your Honor, I have thought of what relief I would like from the Court. It is twofold. I'm going to ask the Court to instruct the jury specifically with respect to the expert testimony that the defendants are under no burden to offer testimony to the contrary; secondly, a point related to it in Mr. Dorsey's argument that I am going to ask the Court to instruct the jury, and it has as its base a confusion in the evidence, is that Mr. Dorsey stated that certain defendants stipulated to handwriting, and what I am concerned about is that the jury may have the impression that the Defendant Coffey stipulated to the handwriting -- every other defendant did stipulate --

MR. ZALOWITZ: I did not.

MR. BOWMAN: I stipulated to part of it.

MR. ZALOWITZ: I didn't stipulate at all.

MR. BOWMAN: In any event, Mr. Dorsey said some of the defendants stipulated to the handwriting. Then he went

on and said there was some cross-examination of the experts. What I would ask the Court, for the Court -- is to state the defendants who have stipulated, or I don't even need that -- what I would really like is for the Court to instruct the jury that the Defendant Coffey has not stipulated to the handwriting which appears on the rental documents of the Avis truck.

THE COURT: I take it you want that done in the charge as a whole?

MR. BOWMAN: Well, I am concerned that by the time I get to argue this fact is going to be -- this confusion may be in the jury's mind.

THE COURT: Well, I don't think I can stop at every point where something one lawyer says may be controverted by another and give a little instruction to try to straighten it out. I will be interrupting a thousand times.

MR. BOWMAN: I understand that. The reason why I have asked for the instruction in a more immediate stage is that it is such a central issue to my case, and I don't want the jury to be under a misapprehension for a lengthy period of time that I have to spend in my argument dissuading them of -- and all I am really asking for is what the clear evidence does show.

THE COURT: Well, you know, if we were to five minutes from the end of all the arguments and I could assume that this is the only time I will get this request, I wouldn't be very troubled, but I don't know how I am going to do that

for you and then have the remaining nine lawyers, who are going to argue, and everybody else saying well, that's not quite the way it was and I would like them straightened out right away. I don't think that's the purpose of on-the-spot curative instruction.

If he had flagrantly misstated something -- but he didn't come anywhere near misstating. He didn't say Coffey stipulated, he didn't say anything of the sort.

MR. BOWMAN: He said some defendants --

THE COURT: He said some stipulated and that is the fact. You can handle it in argument. You can point out that while Mr. Dorsey said some, as you will recall Mr. Coffey wasn't one of them and Mr. Dorsey didn't claim it.

MR. BOWMAN: I understand that, your Honor. I feel that it needs clarification now and I just can't acquiesce in the Court's statement to me that because there are eight other counsel that I am not entitled to relief in my case.

THE COURT: Well, I don't think I am going to start down that road. Really, if something has happened that is improper that needs a curative instruction on the spot, I will do that but his statement about the stipulation was not incorrect. It was his argument from his evidence.

Now you want to make your argument from your evidence. I have no hesitancy to include in the charge as a whole some comment that will focus the jury's attention on the

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distinction but I just don't think I can start intruding that way fact by fact.

MR. ZALOWITZ: Your Honor, may I enter my objection. Mr. Dorsey had stated with reference to checks being issued in the amounts of $3,000, 3,000, 10,000, 5,000 as per the checkbook.

Mr. Dorsey is well aware of the fact that when he put on the special witness as to the handwriting of Reverend Bubar and the checkbook, I was able to focus and bring into clarity I believe the statement by the special agent that he was not asked to compare any handwriting except the handwriting on the checks, not on the notation that was aside of the checks, and I believe that Mr. Dorsey has misquoted the evidence to the jury.

THE COURT: By arguing it's in his handwriting?

MR. ZALOWITZ: By arguing that the notation of the monies that were allegedly given to Peter Betres that's on the side -- if I may have it --

THE COURT: I know what you are referring to. The stub entries?

MR. ZALOWITZ: No, sir. On the facing page was not a clear exposition of the fact and I am asserting that Mr. Dorsey has misstated the position to the jury.

THE COURT: What is it you are claiming he said that was incorrect?

MR. ZALOWITZ: He stated that the monies per the checkbook, that the best of my recollection as to the amounts that were given to Peter Betres, which was in the handwriting of Reverend Bubar, was in certain amounts and that's not true. There is no such evidence here.

THE COURT: I hate to disagree but there is evidence. The evidence is the checkbook itself and handwriting exemplars which are available for the jury's own inspection plus the further inference the jury is entitle to draw from what the expert said about the check writing.

Now, he did not say nor have you claimed --

MR. ZALOWITZ: Yes, I have.

THE COURT: Let me finish the sentence. You don't know what I am going to say.

He made no argument that the checkbook entries had been testified to by the document examiner. He simply made his argument that they were in the handwriting of Reverend Bubar. There is evidence to support that argument, so there is no reason to deal with this subject any further at this point.

MR. ZALOWITZ: I differ with the Court for one reason --

THE COURT: I don't need to hear your further argument. You made the point. I am satisfied it was fair argument. When you have your chance to argue to the jury, you can argue to the contrary if you are so advised.

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MR. ZALOWITZ: I note my position and my objection.

MR.CRAIG: I have a brief request, your Honor. Mr. Dorsey argued with respect to the Just case that Casper Tucci had identified Mr. Just. No such identification is in evidence whatsoever, either of a photograph or of an in-court identification and I would request that your instruction on that point --

MR. DORSEY: I can't help the Court in that regard. I don't remember what I said.

THE COURT: I'm trying to remember exactly what was said. I don' think there's much dispute that Mr. Tucci did not make an identification, but what was the reference in argument --

MR. CRAIG: He said that employees of the plant, including Jeannette Kordiak, Casper Tucci, Walter Pinchuk identified Anthony Just as being in the plant and Casper Tucci did not identify Anthony Just in the plant. There are three people that make any claims that Anthony Just was in the plant, Pinchuk --

MR. DORSEY: I am frank to say I don't remember what I did say. I think that there is a notation in the file about Tucci. Whether it was the subject of testimony I just don't recall. I thought I had intended to put Casper Tucci in relation to Just insofar as the trip of the 17th and his being

there, but I don't remember what I said in relation to the identification. I honestly don't remember. I didn't intend -- I am advised by Mr. Craig, and I have a recollection to the contrary, if Casper Tucci did not make an identification in court that may be the case. I don't argue that, but I don't honestly remember what I said, frankly.

If the Court feels, accepting Mr. Craig's observation, that the evidence is as he has testified that there is evidence of other identifications but not by Casper Tucci, I have no objection to that.

MR. CRAIG: He was here when Casper Tucci was testifying and I was poised and ready for that and no identification --

THE COURT: I am satisfied from reviewing my own notes that Mr. Tucci did not --

MR. CRAIG: He was alerted as to the argument as to what he was going to say as to which individuals had identified Mr. Just and he did mention the name Casper Tucci.

MR. DORSEY: I am perfectly willing to accept Mr. Craig's observation and if your Honor feels in the course of the charge, an observation in that regard, that there were others but not Casper Tucci, I have no objection. I thought that's what you suggested.

MR. CRAIG: I would object to a curative instruction that there were others but not Casper Tucci. I

would ask an instruction that there was a mistake made. You can even say it was an inadvertent mistake, I don't care about that, but there was a mistake made and Casper Tucci did not identify Mr. Just in his testimony in this trial.

The form of the instructions, your Honor, I am sure you can do much better than I can off the top of my head.

THE COURT: I will have to make some reference to the remark that he listed those who had identified Just and explain that Tucci should be withdrawn from those, from that group or whatever it is.

MR. CRAIG: Because he did not identify Just in the courtroom.

THE COURT: Yes. Is that something you want included in the full charge?

MR. CRAIG: I would request at this time, first thing tomorrow morning, not on the actual charge. I don't need it in the full charge, just a curative --

MR. DORSEY: I don't know how many curatives your Honor will do. I certainly hope we can pick through and find the flaws in what I did without some temporary observation--

MR. CRAIG: Identification is the key issue in my case and it's not a matter --

THE COURT: I told you I will give it.

MR. NEIGHER: Your Honor, I have a similar request except it's a little broader on the scope. Mr. Dorsey

stated two or three but I think it was three witnesses at the Holiday Inn identified Defendant Ronald Betres in court and it's just not true. As a matter of fact, --

THE COURT: I am not sure -- this would worry me about Mr. Craig's point. I don't think that's the way the argument was made. He didn't say as to one person. He talked about the people who were there. He included your client.

MR. NEIGHER: No. What he did, your Honor, was this. He went through each of the three gentlemen who were alleged to have been at the Holiday Inn on the evening of the 28th and the first with Defendant Just he named two individuals who identified him. With Defendant Coffey he just said four or five people identified him at the Holiday Inn; with the Defendant Ronald Betres Mr. Dorsey said that he was identified by three people at the Holiday Inn and who said he was bald. Now, --

THE COURT: Said he was what?

MR. NEIGHER: Who also said he was bald. Now the key words, of course, is identified -- the key words are identified by three people.

Now, if your Honor please, I would just point out to the Court that of the five Holiday Inn witnesses who appear on that November 7th, not one of them, and I repeat not one of them, identified Defendant Ronald Betres in Court. One of them did --

THE COURT: He didn't make any reference to a courtroom identification.

MR.NEIGHER: Well, okay. His words to the jury were that as to Defendant Ronald Betres he has been identified by three people in the Holiday Inn. That's simply untrue. Whether they are in Court or out of Court, it's simply untrue.

One of the witnesses testified that a photograph shown to her in May resembled, and that got into evidence. I think that was Joan Tallman.

Another one, I believe it was Kelsey O'Conner said the two gentlemen in the courtroom, one sitting on one side of the room and one sitting in the back of the room without the glasses, and if they were bald then they might resemble, but of those -- but that is a far cry from three people at the Holiday Inn identifying Ronnie Betres. There is not one positive identification in Court. There is only one photograph identification and I would be glad to point out to your Honor the transcript. Like Mr. Craig, identification is my case, your Honor.

THE COURT: Of course, this is what concerned me and this is why I may have to leave it to the full charge because if every time somebody says something I'm going to have to do this, we will never get through this --

MR. NEIGHER: I would be happy to have it in the full charge, your Honor, because I'm going to argue, too.

THE COURT: I will decide what to say on that after I hear your argument.

MR. DORSEY: Should I reserve observation in response to what Mr. Golub has said until tomorrow morning?

THE COURT: I think it will be more useful if you hear all his claims and then respond.

MR. GOLUB: Does the Government object to my reserving argument until tomorrow morning --

MR. DORSEY: I am in no position to argue --

MR. GOLUB: I don't want the Government to appeal and say I should have done it tonight.

MR. DORSEY: That's between you and his Honor and I will abide by whatever decision your Honor makes.

THE COURT: I will hear you tomorrow morning at 9:30.

Adjourn court.

(Court was adjourned at 5:25 p.m.)

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and that really depends upon two things. One is: what were the facts? And those you should find just from the evidence as you heard it in court, testimony of the witnesses, the exhibits, not what somebody else has told you, not that somebody else has suggested that you be sympathetic to them, not that you be antagonistic to anybody, but, rather, that you objectively consider all of the evidence and make a determination as to what the facts may be. Then you would apply, of course, the law as the Judge will give it to you, and then make your final determination.

One of the things that I would ask that you do in this regard is to put aside irrelevancies. A lot of times in the course of the arguments I think the defendants have referred to various aspects of what they would want you to consider in the attempt to try to divert you from what are basically the issues in the case. I would ask you to put aside those irrelevancies.

What am I talking about -- and I won't refer to all of what I gleaned in the course of notes -- but keep these few examples in mind. There's been some reference to this being a legitimate transaction, a relationship between the defendant Bubar and the defendant Peter Botros, because it dealt with printing equipment. What evidence is there that there was ever any consummation of any deal to transfer printing equipment? What evidence was there that the deal was consummated, having in mind that, according to the records, twenty-one thousand dollars

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passed hands between the defendant Bubar and the defendant Peter Botres? Why would the defendant Bubar be purchasing equipment in any negotiation or dealings with Peter Botres when, according to two of his own parishioners, when he moved from Memphis to New York and opened his headquarters in New York, keeping, of course, a place down in Memphis, also, but he sold printing equipment? As I recall two of the parishioners' testimony.

Another item that was raised for you was the contention that Peter Botres, on February 28th, got a limousine to New York in time to get at Kennedy Airport at ten o'clock at night. I ask you what evidence is there of that? There's no evidence of a plane ticket, no evidence of a reservation, no evidence of any payment for any such trip; and, of course, there's also the question of how one would make what is generally described as a two-hour trip on the limousine, sometimes taking only an hour and three-quarters, but then getting to the precise terminal -- and you have in mind that there are many terminals at Kennedy Airport. One would have to get to the precise terminal from which the plane is going, check in, and then actually get on board the plane, all within a two-hour span, when the trip itself takes generally at least an hour and three-quarters, if not two hours.

Now, Mr. Sagarin, you may recall when he discussed this, made some reference: well, the records are all destroyed. Well,

went to Sayre's while Mr. Bubar came to the plant and went to New York and came back, and eventually Peter Betres was picked up on the bridge between the Howard Johnson's and Derby.

I suggest to you that all of that involvement clearly indicates this was not a simple printing press transaction. It ties much more specifically and pointedly into an involvement centering around the Shelton plant.

You further have no reason in the world why, with all of the money that's been transferred, that there wasn't a delivery of some printing press equipment, and you can be sure that if there was any such consummation, you'd have had the evidence of it.

There is further the fact that Peter Betres hung around the Howard Johnson's during the afternoon of February 23th, while the defendant Bubar went to New York and came back; and I suggest to you that the reason he was there was because Donald Connors was coming up from Pennsylvania with a truck load of gasoline, dynamite and detonating cord.

You remember that Donald Connors made a call from New York someplace and got further instructions, and then came to the Howard Johnson's in Derby.

Now, the position of the defendant Bubar I think is also extremely vulnerable because you had absolutely no explanation for much of his involvement, much of his whereabouts. Specifically and particularly, you have no explanation as to his

efforts to obtain an alibi. You have phone calls made to a Mr. Wilhlem down in Tennessee, and no explanation for that at all, and it clearly was an effort to obtain and establish an alibi, a false alibi, an attempt to claim that Mr. Wilhelm was, indeed, at the plant when, in fact, there was no evidence to substantiate it, and, indeed, he was not at the plant on that particular day.

You have the fact that contrary to the claims of some of the defendants that pertain to the Southern Supply account, the defendant David Bubar was the sole person who had anything to do with the checkbook and the checks that were drawn on the account. He was the one that made the deposits of the checks from Ohio Dec, in one instance, and Sponge Rubber in the other. He's the one whose name appears on the checks that were issued, including the ones he cashed himself, and the ones that he gave to Peter Betres. He's the one, according to the handwriting expert, who made the entries in the book, the checkbook, that indicate that out of the twenty thousand dollars received on February 10th, sixteen thousand dollars of it was immediately transferred in the form of checks and cash to Peter Betres. No explanations for that whatsoever.

You have Mr. Zalowitz's claim that the water reclamation, as he emphasizes it, was applicable to the Sponge Rubber plant. Yet, you have Mr. Talalay who told you that it had no application whatsoever.

Furthermore, the water treatment process that we've

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talked about was not the subject of a patent, it was in no way the subject of any specific endeavors or improvement or inventiveness on the part of the defendant Dubar.

You have this box in a car in the rear -- in the rear of the car of Sponge Rubber Company which was in the possession and control of the defendant Dubar on the 28th, the evening, and then all day on the 1st. It is corroborative, we submit, of John Shaw's testimony of the meeting in which certain gear, certain equipment and materials was put in the back of the defendant Dubar's car and, of course, you have the two fingerprints in there that are totally consistent with that. Michael Tiche and John Shaw obviously came in contact with that box in the back of the defendant Dubar's car in the course of the meeting at Howard Johnson's.

Now, Mr. Zalowitz said to you at the conclusion of his argument that somebody has made a sucker, and he spelled it, of Mr. Dubar; and I submit to you, ladies and gentlemen, it isn't the question of what his status was, but what did he do? What did he know? What did he participate in? How did he interrelate with the others? And, from that evidence, I submit to you that there has been no refutation of the thrust of the government's case insofar as the defendant Dubar is concerned.

Now, Mr. Connors has attacked John Shaw insofar as some prior statements that were made, and I suggest to you that you keep in mind not only the precise language of John Shaw's answers

When he made the various stops, when he got to Shelton and eventually got into the plant with the man who took him back there, he said, in effect, he didn't know what was going on, and he didn't ask about it.

He furthermore made the statement that all the circumstances of the trip, to start without knowing his destination, his getting further instructions en route by telephone, a call made to some unknown destination, unknown place. He never asked for an explanation, because he was primarily interested in getting paid for the haul, and he didn't want to know the details, as the less he knew, the better off he was.

He answered certain questions as to whether the trip was out of the ordinary, and he testified that he didn't want to know anything further about it. He was suspicious about something being wrong, but he didn't want to know precisely what was involved.

You furthermore have the evidence of John Shaw that he left, and the question was raised about his smoking, and Peter Botres was to have gone after him and, indeed, drove off in the direction in which he was: that is, Mr. Connors was driving; and I suggest to you with the type of individual that you are dealing with, as far as Mr. Connors is concerned, with the circumstances of that, it is perfectly logical that's exactly what Peter Botres did.

What I'm suggesting to you is that Mr. Connors has not

in any way adequately explained away the thrust of the government's case, as Mr. Golub has made the argument, and that there was clearly knowledge on Mr. Connors part. Indeed, not only actual, but through the conscious avoidance of guilt, which the Judge will explain.

Mr. Just hinges the greatest part of his defense in this case to what he claims to be his alibi, keeping in mind that all of the people that came up here to testify on his behalf told you that they were either friends or relatives of Anthony Just, and they were here to testify in any way that they could to help him, if at all possible.

Now, if you look carefully at the testimony that was offered by Mr. Just, you will see that there is a lot of things that are missing, there's a lot of vagueness and indefiniteness to what was said. For example, his claim that Mr. O'Brien received payment for certain days in which he was working. Where's the evidence of that? Where are the checks to substantiate that he got paid those amounts of money for those particular periods? Certainly, Mr. Pierotti would have had checks for paying him. Certainly, Carl Just would have had records, business records, checks for payments made.

You also have the fact that there's a claim made that Mr. Kashanski had his time records kept by Mr. Barr, and, yet, we only found three or four instances, if I recall correctly, in which any such record was noted, and then it was somewhat less

than precise.

You have the fact that the claim is made that an entry in the block for March 2 was really applicable to March 1, notwithstanding the fact that there is an entry in the block for February 28th in that record of Mr. Barr, and the 28th is a Saturday.

You also have a record on March 15th, which is a Saturday. Now, having in mind that no real explanation was made as to why that block for March 1 wasn't utilized, you also have the fact that as a preliminary to any concrete lain, according to Mr. Barr, you had to have cinders lain, and there was no entry of cinders being laid prior to or on the date of March 1. There are entries after March 1 for the laying of cinders, and you remember that when he got back on cross examination, Mr. Barr covered that one by referring to the fact that they laid the cinders the same day.

The discrepancies with the witness, Mr. Barr, whose building was involved, in large measure, came from the questions about when there were sequential Saturdays in which work was done. According to Mr. Barr, and he was very explicit about it, he related to the Saturday next prior to the T-shirt contest, and, yet, the record clearly indicates that even if you attribute the March 2nd work to March 1st, there was only one Saturday in which there was cement laying in his house, because the February 28th work was at another location. And the only consecutive

in my opinion.

I suggest to you that you look at the log. This is a log that is supposed to be kept in the field by workmen, and when you dynmate in the field, it's not like working in a spic and span clean laboratory. What I was alluding to was that the log does not bear the character of what a field notebook would normally show.

Further, you have in mind the offer of the evidence of the one thousand dollars deposit in Mr. Tiche's accounts four or five days after the fire. He was on the stand at the time. He was redirect examined by his attornty. No explanation was offered as to the source of that, no other records offered as to where that money came from, and, indeed, in argument, there was no specific identification as to that coming from any other source.

You have Mr. Tiche's claim that the trip on February 21 was, in effect, the subject of a telephone call that Mr. Tiche received -- or Mr. Shaw received, rather, and told Mr. Tiche about -- and, yet, that in no way is consistent with the claim of John Shaw that the trip was canceled on the 21st; and he is corroborated in that by Mr. Connors' observation that he went on the one particular day, a Friday, at the end of February, and the trip was, in fact, canceled; so it is totally inconsistent that John Shaw tell Mr. Tiche on February 21 about a trip the following day when it's already been canceled, for all intents

and purposes.

You also havefrom Mr. Tiche no explanation about the phone calls. He said that no one got the phone calls of February 28th, but you remember that Miss Fobes testified that she was there all the time, and that applies on the 21st, also. The three phone calls on the 21st are to be found in the record. That clearly is involved.

Furthermore, he claims that he has certain receipts for certain trips, but where are the receipts for the gas that he charged on the trip of the 17th? Where is the receipt for the airline tickets he claimed he bought and paid for on the 28th?

I suggest you that Dennis Tiche's whole story is so fraught with falsehoods -- and you remember that he conceded that he told a great many falsehoods when he was interviewed by the FBI. He denied having been at any time in Connecticut, in the first interview, that he was here.

Then he made some statement that in February he received -- he received a phone call from an unknown male who asked him if he was interested in purchasing some used machinery. The claim is that at that particular juncture that he was being set up by John Shaw, who knew, as Mr. Curtis said to you, that when some purchases were in the offing, Dennis Tiche would jump in his car.

Well, he described that he jumped in his car, and he drove to LaGuardia Airport where he was met by two unknown males,

government as far as Mr. Tiche is concerned.

And the same thing is applicable for Michael Tiche, because in no way has there been any adequate explanation for the existence of that fingerprint in the back of the automobile of defendant Bubar.

With respect to Mr. Betres, I would point out the lack of any substantiation for the claims about the printing; the fact that when he got the two checks down in Pennsylvania, he claimed that the source of those was the sales of salad oil to some religious organization. Totally inconsistent with any other story. The fact that he had the truck returned by the defendant Connors, witnesses by Mr. Barnhart and Miss Thomas.

You notice that Mr. Sagarin concedes that Mr. Povilaitis is right, that Mr. Betres was here on the 7th of January and the 28th, but he was wrong about one other day. It's a little difficult to concede that a man's identification is proper on one occasion -- two occasions surrounding an occasion on which it is denied.

The information with respect to the flight, the little stub that was in Mr. Bubar's car, I suggest to you, reflects and corroborates the telephone call to Allegheny trying to get Peter Betres back with a flight number recorded and the time of a flight.

Now, with respect to the defendant Moeller, please note that, if nothing, it is the nature of the destruction, which

Mr. Coffey refers to various testimony, and I would only suggest to you that in no way has he refuted the fact that his handwriting has been identified on the Avis contract, his handwriting has been identified up there at the Danbury motel in a room which defendants Just and Ronald Betres are also placed. Use of a false name, the name Baucan at the motel. The use of a false name at the time thathe was arrested, all of which I suggest to you -- thatindicates that John Shaw is totally corroborated in this respect. Shaw could not otherwise have picked out Coffey and tied in all of this independent information that related to him, including specifically the rental and the various handwriting. Ronald Betres has in no way explained the telephone call made from New Jersey the early morning hours collect to his own phone in Pennsylvania. His fingerprints are there in Derby, and they were explained by Mr. Oliver. No questions were asked.

The same room as Coffey, as Just and the identifications, you may recall that there is -- I think you'll find there is an Exhibit 58 which was a photo which was identified by the Tallman witness, Joan Tallman, as a person she saw. And you remember that there was an identification of Ron Betres' car, and you will find that the registration, which is Exhibit 50, describes the exact car that John Shaw described, a brand-new red Buick. The description of the wig, the attempt to get a photograph of him in Pittsburgh, I suggest to you just

have various efforts at the coverup, destruction of the drums, the dumping of the gasoline, the Bubar alibi effort through Mr. Wilhlem, Mr. Betres' sale of salad oil at the time of the three thousand dollar checks that he received from the defendant Bubar, Mr. Betres' attempt to retrieve and hide from further disclosure the five thousand dollars check.

I suggest to you that as to all of the defendants, there is a basis on which you can find culpability. As to Mr. Connors, it basically comes from the conscious avoidance of guilt, of knowledge. From Mr. Moeller's point of view, it was through his friend, Mr. Bubar, his consultant and advisor, that he arranged for the arson. He knew of the prediction, and there's no evidence he took any steps to avoid it. He knew he had a loser on his hands on the plant, and the report to Mr. Fuchs was no way consistent with it having been turned around.

You have the detailed arrangements for destruction that could only be tied through Mr. Bubar to the defendant Moeller. He obviously thought that the -- he had insurance, and with the replacement value, he would get more out of it than his figures in here would tend to suggest. And to carry all of this out, he gave the money to Mr. Bubar, and it went directly and immediately, in large part, to Peter Betres in the form of the checks and the cash.

His reasons for the payment and the making good of the replacement raises serious question as to their validity in

all of the circumstances of the case, and the claimed lack of any explanation from Mr. Bubar as to what was done with the money or his activities strongly suggests that Mr. Moeller had much more knowledge than he was in any way willing to concede.

Putting all these things together, putting together the phone calls that were received by Mr. Moeller, we claim, right after the fire, a time when David Bubar couldn't have known about the fire -- the call was made thirty-five minutes from the time that the explosion went off, he said he had no knowledge of it except from what the FBI told him -- keeping all of those things in mind, I suggest to you that it is perfectly proper for you to find that Mr. Moeller was involved.

The claim is made that, in retrospect, does Charles Moeller and the rest of those people look stupid to you? The fact that they got caught maybe had something to do with that. Maybe they thought they were going to get away with it.

Ladies and gentlemen, you have heard all the evidence, and I suggest to you that you consider it all and try, when you have the Judge's charge in hand, to consider how it all interrelated, and that includes the evidence of John Shaw, as I think you will find the specific corroborations have strongly suggested that he's credible throughout.

As far as the government is concerned, we also appreciate your attention, and I am sure that when you have concluded your deliberations, you will have done what you

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THE COURT: All right, ladies and gentlemen, I am not going to give you the instructions of law this afternoon. I'd prefer to do that in the morning. We can start fresh. I will give you the instructions. They are somewhat lengthy, not surprisingly, in a long trial, they will not consume the day, and if we start at ten o'clock you will have the case for deliberation tomorrow, at least, to begin deliberations.

I will discuss many topics in the charge tomorrow. I think perhaps I ought to just clarify one thing right at this instant. In the course of the arguments that you heard, first the government's argument, defendants' replies, and then the government's, as it is called, rebuttal. Sometimes there was a reference back and forth either to an attorney or to a defendant. Sometimes they were almost interchangeable. There might have been a reference to, "Mr. X said," or, "didn't say," something. And sometimes it was the attorney and sometimes it was sort of the personification of that defense using the defendant's name rather than the attorney's name.

Well, I just want to be clear with you, I will say more about this in the charge, that when any argument is made that somebody didn't say something, that's the argument of the lawyers. That's in no way a reference to a defendant not doing something. As I will say to you in detail tomorrow, those defendants that chose, as is their right, not to testify have an absolute constitutional right not to testify and there can

be no adverse inference drawn from that fact whatsoever.

Now, what the lawyers say to each other is a matter of argument. One lawyer says, "You have a chance to argument and you didn't make an argument." That's a matter of argument back and forth between the lawyers, and to the extent there was an interchange of names as between a lawyer and his client, I just want to be sure that there is no doubt in your mind that the references are to explanations or lack of them among lawyers and not among defendants. Some defendants did not testify, as is their right, and there's to be absolutely no adverse implication at all from the fact that a defendant did not testify.

All right. Let me just find out before excusing the jury at this moment if counsel can advise me. Is there to be any requests that anything else be said to the jury at this point? If there is, I will excuse them for a recess and hear you. If there is not to be such a request, I will dismiss them for the day.

There is to be such a request?

MR. SAGARIN: I think the Court clearly recognizes the problem and I think we all talked about it before.

THE COURT: All I want to know is whether somebody contemplates asking for further instructions today.

MR. SAGARIN: Yes, I do.

THE COURT: All right, ladies and gentlemen, then I will just give you a recess and maybe I will have to bring you

back for three or four minutes.

(Jury excused at 3:30 p.m.)

MR. SAGARIN: Your Honor, the issue was the one the Court dealt with in discussing the matter with the jury, and that is, throughout his summation Mr. Dorsey clearly, unequivocally referred to it -- primarily every defendant I can think of who didn't testify as offering no explanation about some particular item.

Mr. Betres' case, it happened to be about checks and, in fact, it happened to be about a checkbook I couldn't cross-examine either Mr. Betres on because he exercised his right or Reverend Bubar, who made the explanation -- of course, he chose not to testify -- and about delivery of printing presses.

Each of the other defendants I think have other grounds that they'll bring to the Court's attention.

THE COURT: What I want to know now before the jury goes home is do you want me to say something and, if so, what?

MR. SAGARIN: The first thing I want you to say that the -- is that the motion for acquittal is granted. I understand that -- you know, that's the first choice. Secondly, I would ask you to instruct the jury that the argument made by Mr. Dorsey to that extent -- to the extent that it called upon any of the defendants to explain anything or to expect them to testify to anything was totally improper and illegal argument. That's the instruction I want.

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MR. ZALOWITZ: I would like to make my comments even greater fortitude and greater advice than learned Attorney Sagarin. The Court is aware --

THE COURT: Mr. Zalowitz, I will let you argue, but the jury hopes to go home and so what I want counsel to tell me now, as Mr. Sagarin just did --

MR. ZALOWITZ: That's just what I intend to do.

THE COURT: -- is simply what, if anything, you want me to say to them.

MR. ZALOWITZ: I'm saying that it was gross misconduct on the part of Mr. Dorsey every second -- first, second, third and all words, almost without exception, was to the fact --

THE COURT: Please, don't. Don't tell me why I should do it, tell me what you want me to say to them.

MR. ZALOWITZ: I'm asking for a mistrial at this stage because of the conduct of the U. S. Attorney.

THE COURT: That has nothing to do with instructions.

MR.ZALOWITZ. Now, as to instructions, sir, I am going to reply, sir. Please. Without being hurried, please.

THE COURT: No. That's the point. They're hoping to go home.

MR. ZALOWITZ: But I'm hoping to defend a man, sir.

THE COURT: And other counsel are anxious to tell me what they want said to the jury.

MR. ZALOWITZ: I shall not be precluded either, sir,

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by reason of time or the friendship toward the jury. I'm here to defend a man and I so stand here.

THE COURT: I need no rhetoric at this juncture. I want to know precisely what you want them told today. Any other arguments I will hear after they have gone home.

MR. ZALOWITZ: I want the Court to instruct them that all comments -- all comments -- that were made by Mr. Dorsey with respect to the failure -- and the intonation was -- the failure of Reverend Bubar to reply, or my failure to reply, is absolutely not commendable, but condemnable; and I am saying that all statements that he made should be excluded from the comments that he made to this jury and specifically everything that he said in the last half hour specifically referred to the "failure of Bubar"-- and he doesn't even address him with the dignity of "Reverend Bubar." But be -- albeit that, the failure of U. S. Attorney to do anything but to brainwash this jury into that which he has no right to say in this courtroom, and that is, that he has no right to allude to the failure of Reverend Bubar in any wise to refute or take any stand to deny.

MR. KOSKOFF: I think, your Honor, that most counsel -- at least I know I would be satisfied -- if your Honor gave the instruction that Mr. Sagarin asked for. Now, the problem is similar to the one I raised with you yesterday, about asking Mr. Moeller to supply a motive for Mr. Bubar, for example. Now, we have no obligation to supply any motive of Mr. Bubar.

I don't think the instruction "the accused isn't obliged to do anything" is sufficiently specific. Just like I think Mr. Sagarin's comment was well taken. I think if you say something to the effect that Mr. Sagarin suggests it would solve the problem, as far as I'm concerned.

MR. NEIGHER: If your Honor please, I join Mr. Sagarin's motion for a judgment of acquittal. On the same ground. The question was: "What instruction you wished." I would just note for the record that Mr. Dorsey said in context of the defendant Ronald Betres, "He has in no way explained his phone call from the Jersey Turnpike," and consequently I join at this stage in Mr. Sagarin's request for the instruction. He gave you the language for that instruction.

MR. GOLUB: Your Honor, on behalf of defendant Connors I'll join with Mr. Sagarin in his requested instruction. The comment with respect to Connors that gave rise to it was an explicit -- explicit reference to Mr. Connors, "And Mr. Connors has not adequately explained away," et cetera, et cetera. Although I don't agree with Mr. Koskoff that that solves the problem.

MR. CURTIS: I would join, your Honor, in Mr. Sagarin's request, and I would specifically note that there were four specific instances in which Mr. Dorsey made grossly improper comments. One, he said there was no explanation for a thousand dollars; no explanation of phone calls February 28th, three

phone calls on the 21st. No explanation. Then he said -- he was speaking pretty fast at this time -- I think he said something -- "Where are the gas receipts. Where are the receipts of airline tickets?" He's calling upon defendants to produce specific evidence. I think even -- the instruction Mr. Sagarin asked for would apply even to defendants who did testify. Because I think Mr. Dorsey is calling upon a defendant, even if he did testify, to supply evidence. I think that's a definite shift in the burden of proof and I think it's clearly improper.

MR. CRAIG: Your Honor, I have no specific request for instruction. My instruction bears on the reference made by Mr. Dorsey to the absence of checks or business records. And one comment out of ten -- I counted ten references to the failure either to testify or the failure of the defendants to present evidence. Neither one of those things did they have any obligation to do. And my request for an instruction would be that Mr. Dorsey made a reference to the absence of certain business records and checks with respect to the defense, and they just -- the defendant has no obligation to present any evidence whatsoever; and the jury should recognize that the government has subpoena power, should have access to those records and could have brought those records before you either as direct testimony or in the rebuttal testimony. The decision not to was their decision. I think there was an unfair inference made. It's an unfair argument that because we didn't present those records they were

incriminating. If they were exculpatory, we would have. And the implication also that we have hidden from the government when they have subpoena. I think it's specifically unfair to Mr. Just's defense. And I also think that, given the ten other comments that I made careful notes on, that I join Mr. Sagarin's request.

MR. CLIFFORD: Your Honor, on behalf of the defendant Michael Tiche I join in Mr. Sagarin's motion for judgment of acquittal and, also, his motion, lacking granting of that, an instruction to the jury as he requested.

MR. BOWMAN: Your Honor, I also join in the motion for judgment of acquittal as Mr. Sagarin said. I have a specific request, and that is, an instruction to the jury that it is a question for the jury -- I should paraphrase this -- I'm sorry, preface it -- by the fact that Mr. Dorsey's comment with respect to the defendant Coffey was that Mr. Coffey has in no way refuted the testimony of the handwriting, concerning the handwriting the government's offered, and the request that I'm asking for is that it is for the jury to determine whether the government has proved -- whether the government has proven beyond a reasonable doubt that the writing in question is that of Mr. Coffey.

MR. CURTIS: Your Honor, one more thing. I believe Mr. Dorsey stated -- misstated facts in the record about Mr. Amrol's story of nitrates. I have looked through my notes. I can find

nowhere that Mr. Amrol -- found calcium nitrates. I don't believe that was ever related to any explosive. I am not asking for an instruction right now, but I will ask for one tomorrow morning on that subject.

MR. ZALOWITZ: And may I just, at my conclusion -- shall be less than a half a minute. I am asking this Court, number one, I'm asking for a mistrial and/or, in the alternative, for a judgment of acquittal for Reverend Bubar because of this contemptible action by U. S. Attorney Dorsey. He was given the instruction with respect to "no comment." He violated the instruction of this Court.

THE COURT: Mr. Sagarin, do you want to state the request so Mr. Dorsey can have it in mind when he replies?

MR. SAGARIN: Your Honor, the request i[illegible] -- and I did have it written -- it written out, I can't really find it, but the request is that the jury be instructed that Mr. Dorsey's argument to the extent that it called upon any defendant -- and of the defendants either to testify or to explain away any of the government's evidence was improper, uncalled for and illegal.

MR. DORSEY: I really don't think I could add anything to what your Honor has already charged -- or already advised the jury in that the whole tenor of my observations were in relation to the arguments made, and were made in that context. And I think that what your Honor has said already to the jury deals with the problem. If your Honor feels that, in response to the

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observations made, that any rephrasing of that, restatement of that more emphatic thrust, insofar as I discerned, that the comments pertaining to the arguments of counsel and the lack of anything further, as far as I'm concerned, I can only say I have no disagreement with it and I have no objection to whatever form. I don't think it's proper for the Court to describe an argument as illegal or improper. Because that doesn't mean anything to a jury. If there is any suggestion -- which I had no intention of making -- but if there is a suggestion that in any way is to be drawn from my observations on rebuttal, I think that the Court's means of taking care of it in your prior instructions were perfectly proper. However you want to reinforce that, if you feel it's necessary, in response to the observations, I take no exception to it at all.

(Jury returned at 3:40 p.m.)

THE COURT: Ladies and gentlemen, with reference to what I said to you just before you took your recess, I indicated to you the way I thought you should treat the colloquy between counsel, and instructed you to take any reference that may have been made to counsels' argument or to a named defendant, as the case may be, as referring to counsels' argument and not to what a defendant did or did not do, and I explained to you just a few moments ago the strict rule of law that applies in these situations.

I will simply add to that, that, to whatever extent

the argument of government counsel called upon any defendant to testify or to explain away any evidence, to whatever extent that may have occurred, such argument was improper, uncalled for and illegal.

Now, the argument may not have been intended to be taken that way at all, and I have instructed you not to take it that way. I think that is all I will say on the topic right now. I will make some other reference to this and other issues tomorrow when I instruct you on all the principles of law that apply to this case.

All right, the jury is excused until ten o'clock tomorrow morning.

(Jury excused at 3:45 p.m.)

THE COURT: Please, gentlemen, take your seats.

To the extent that counsel have made motions for mistrial orjudgment of acquittal based on rebuttal, those motions -- and I assume they're joined in by all , perhaps everyone did not articulate the same motion -- but I take it nine defendants have made nine motions for mistrial and nine motions for judgment of acquittal. All 18 motions are denied.

I am satisfied that the references that are objected to were not motivated by any deliberate effort at misconduct at all. I think in most instances the jury probably took the reference the way I told them to take it. In some instances the allusion to counsel came in the same sense -- for example,

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in the reference that Mr. Colub called my attention to -- he inserted an "et cetera" -- my notes indicate that the full line, including the "et cetera," reads as follows: "Mr. Connors has not explained away, as Mr. Colub makes the argument." So in that instance the allusion to counsel's argument was in literally the same breath.

There are one or two instances where it was not so clear and where it wasn't possible that a juror could have thought the reference was to a defendant individually and not a defendant as represented by counsel.

It is unfortunate the comments were made, but I am satisfied that what I said to them immediately at the conclusion of the argument, and as added to at the suggestion of counsel, is adequate in the context of the entire case to satisfy me beyond any shadow of a doubt that the cases of these defendants can be fairly tried by this jury.

If this were a one-day trial, I might, but it's not a one-day trial, so the motions are denied.

Now I will hear counsel on other matters, but I want to let you know two things that ought to be done before you leave today. One is that the exhibits ought to be reviewed this afternoon so that the counsel can satisfy themselves, and the clerk and myself, if there is any dispute that the exhibits are in proper form as far as which are full exhibits so that at the conclusion of the charge the bailiff can promptly take all the

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THE COURT: I can't do it that way, for the simple reason that as they were offered they weren't identified that way. The main reason they weren't is that testimony, in less limited a case, is available in all cases. So it's impossible to do it, because it wasn't done that way initially, and I am not going to go back over several hundred exhibits and find out who offered them and, secondly, it would be inaccurate because, in fact, the exhibits are available in all cases except to the extent limited.

MR. ZALOWITZ: Whatever the Court feels. I merely offered the suggestion, your Honor.

MR. CRAIG: Your Honor, with respect to the specific request for instruction that I made to your additional instruction I would renew that request and ask you that it be included in your general instructions tomorrow with a specific reference to the government's argument that the business records and checks have not been produced here. There is no obligation on -- burden on the defendant to present evidence.

THE COURT: I understand there's no burden, but frankly I'm not really so clear as counsel that that's anywhere near an improper argument. The fact that a defendant doesn't have to produce evidence, I wouldn't have thought, means that adversary counsel can't make the observation that the evidence he has produced doesn't prove very much because it isn't accompanied by corroboration. Why is that fair argument?

MR. CRAIG: Well, you know, I'm not saying that it's fair argument, but the inference was made that the government didn't have access to that, and the government really does have the burden and has an opportunity, even more than the burden, because you have that rebuttal and if he was going to make an argument about business records and checks, he could have filed a subpoena and gotten those business records and checks and then made the argument from that or put witnesses on the stand that I could cross-examine about those witnesses and checks.

THE COURT: I don't think he has to do that.

MR. CRAIG: It seems to me if he is going to make an argument on the failure of the defense to present certain evidence, that runs contrary to the general burden that the government has to prove guilt beyonda reasonable doubt, and then any time any defendant even stands up and says -- presents one item of defense, the government by inference, by extending the logic of your argument, can then deluge him with all the things he didn't say.

THE COURT: It happens all the time. It's very common argument for a defendant to get on the stand and testify to an alibi, and then the prosecutor says, "He said he was with ten people. You didn't hear from those ten people." That argument is made all the time.

MR. CRAIG: I'm just requesting the instruction, your Honor, that specifically referred to that argument. I guess we

disagree on whether it's --

THE COURT: Oh, well. I'll certainly instruct them as to the fact that a defendant hasn't any burden at all and doesn't have to produce any evidence.

MR. CRAIG: And there should be no adverse inference drawn from the failure to produce evidence. First of all, there's no testimony that any such records exist, second of all, the inference is that they're adverse, and thirdly of all, the inference is that the government didn't have access to them. Now, I think all of those inferences are unfair, and for that reason I would simply ask for a specific reference. That's all I'm asking for, is a specific reference to that item of Mr. Dorsey's argument that says we had a burden to present all this stuff and we didn't, so you can draw the inference that it's incriminatory or adverse to our case, and I just repeat my request.

MR. CURTIS: Your Honor, this is about the -- Mr. Dorsey's reference to nitrates. I think what he said was that Agent Amrol testified that he had found nitrates at the scene of the fire. Then he further said -- Mr. Dorsey, this is -- that nitrates are components of explosives, and I have researched my notes, and what I think Agent Amrol said was that he found traces of calcium nitrate.

Now, calcium nitrate is not a component of dynamite. Mr. Dorsey never tried to prove that calcium nitrate -- there's no evidence at all that calcium nitrate is a component, a residue

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CERTIFICATE OF SERVICE

This is to certify that two copies of the Appellant's Brief and Appendix were mailed to Peter Dorsey, Esq., United States Attorney, 270 Orange Street, Post Office Box 1824, New Haven, Connecticut 06508, this 24 day of September, 1976.

Andrew B. Bowman
Chief Federal Public Defender